We accordingly dismiss this appeal with costs and order the deposit lodged in court to be paid out to the respondents to account of their costs.

Appeal dismissed.

Solicitors: *Stephen Goh & Partners; Ng Ek Teong & Partners.*

ENG AH MOOI & ORS. v. OVERSEA CHINESE BANKING CORPORATION LTD.

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) August 18; December 3, 1982]

[Ipoh – Federal Court Civil Appeal No. 95 of 1980]

Land Law – Charges on land to secure overdraft facility – Land charged sold to third parties – Third parties applying to discharge the charge – Whether chargee can refuse to discharge charge – Claim of general lien for other sums due.

Banking – Charges – Two current accounts – Charges on land to secure overdraft on first account – Overdraft pledge account pledging all stock in trade to secure overdraft facilities of not more than eighty per cent of value of stock – Sale of the land charged to third parties – Third parties applying to discharge charge – Whether bank as chargee can refuse to discharge charge – Claim of general lien for other sums due.

In this case one Koh Yik Khoay (the chargor) ran a rice mill business and maintained two accounts with the respondent bank. To secure overdraft facilities on the first account he executed two charges in respect of land belonging to him in favour of the respondent. The amount due on this account was $52,219.71. The second account was an overdraft pledge account in respect of which Koh signed an undertaking pledging all his stock in trade, that is, rice and padi stored in his godown to the respondent in return for overdraft facilities not more than 80% of the value of the stock at any one time. This overdrawn account amounted to $199,824.45. The respondent sent letters (a) demanding payment of the money overdrawn on the first and second accounts; (2) giving notice to Koh of the respondent's intention to exercise its power of sale under the pledge and (3) sending a notice of default under section 254 of the National Land Code with a view to applying for a judicial sale of the two pieces of charged land. To save himself from social embarrassment, Koh agreed to sell the lands to the appellants for $52,000.00, the purchase money to be applied to secure the discharge of the charges. The appellants applied to discharge the charges but the respondent refused to accede to their request. The appellants thereupon sued the respondent for a declaration that they are entitled to the discharge of the charges on payment of the amount due. The respondent maintained in his defence that the sale agreement was a fraud and that it had a general lien to retain the charges for the sum due not only on the first account but also on the second account.

In the High Court the learned trial judge agreed with the respondent's defence and dismissed the suit. The appellants appealed.

Held: (1) just as a mortgage is not irredeemable, likewise a charge is not undischargeable;

(2) in this there was no fraud in the sale agreement. The fact that the appellants agreed to mount a rescue operation to save Koh from public shame by buying the property at considerably below the market price could not be held against them, if the respondent's debt was fully protected;

(3) in the present case the arrangements were so specific and precise that there is no room left to doubt as to the parties' intention. The parties did not intend a general lien to arise in respect of the securities for the overdraft due on the second account;

(4) as there was no fraud as respects the sale agreement by which the appellants bought the charged land from Koh and as the respondent had no general lien to hold the charges for the sum due on the second account, the appellants must succeed in the appeal and are entitled to the prayers asked for.

Case referred to:

(1) *Pearce* v. *Morris* (1869-70) 5 L.R. Ch. App. 227, 230 & 231.
(2) *Brandao* v. *Barnett* (1846) 12 Cl. & Fin. 787, 805; 8 E.R. 1622.
(3) *Jones* v. *Peppercorne* (1858) Johns. 430; 70 E.R. 490.
(4) *In re London & Globe Finance Corporation* [1902] 2 Ch. 416.
(5) *Wylde* v. *Radford* (1863) 33 L.J. Ch. 51.
(6) *In re Bowes* (1886) 33 Ch. D. 586.
(7) *Cuthbert* v. *Robarts, Lubbock & Co.* [1909] 2 Ch. D. 226.

FEDERAL COURT.

Karpal Singh for the appellants.
Philip Leong for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the Judgment of the Court): One Koh Yik Khoay (the chargor) ran a rice mill business under the name of Chip Hong Rice Mill. He maintained two current accounts with the respondent bank. The first account, being A/c No. 1676, was opened on December 13, 1957. To secure an overdraft facility on this account up to the limit of $50,000.00 Koh executed two charges in respect of two pieces of land belonging to him in favour of the respondent. On the material date, the amount due on this account was $52,219.71.

The second account being A/c No. 1697 was opened on February 5, 1958. This account was an overdraft pledge account in respect of which

Koh signed an undertaking on March 5, 1958 pledging all his stock in trade, i.e. rice and padi stored in his godown to the respondent in return for overdraft facilities of not more than 80% of the value of the stock at any one time. The respondent employed a store-keeper to keep check upon the value of the stock so that the overdraft allowed to Koh would be maintained at the said ratio.

The respondent also controlled the withdrawal of the stock from the godown for milling or sale by means of delivery orders issued upon Koh's application. The respondent would not thus release the stock if it would reduce the said ratio of 80%. On July 19, 1972 the value of the stock was considerably less than the sum overdrawn on this account and was therefore not in accordance with the above ratio, the overdrawn amount being $199,824.45 whilst the value of the stock then consisting of 9,200 bags of padi and 400 bags of rice was only $179,120.00.

Because of the run down of the stock, the respondent refused to honour Koh's cheque for $5,000.00 drawn on this account on the following day (July 20, 1972), and two days later (July 22, 1972) the respondent made a check of the stock and discovered that 4,200 bags of padi were missing from the godown for no apparent reason as there were no signs that the godown had been broken into or tampered with. To cover up the value of the missing bags of padi, Koh at first agreed to execute a further charge in respect of the two pieces of land to the value of $100,000.00, but later declined to do so.

As a result of the refusal the respondent through its solicitors sent a letter dated July 28, 1972 demanding repayment within seven days of the sums of money overdrawn on both the first and second accounts together with interest thereon. By another letter dated August 23, 1972 the solicitors gave a notice to Koh of the respondent's intention to exercise its power of sale under the pledge and by a third letter dated December 13, 1972 the solicitors sent a notice of default under section 254 of the National Land Code with a view to applying for a judicial sale of the two pieces of charged land.

To save him from social embarrassment, on January 10, 1973 Koh entered into an agreement with these five appellants, two of whom are his relatives in that in consideration of one dollar paid to him the appellants agreed to buy the two pieces of land for a total price of $52,000.00 subject to conditions that the purchase price would be deposited with Messrs. Yeoh Kian Teik & Co., their common solicitors, who would apply the money for securing the discharge of the charges from the respondent and that in the event of Koh being unable to transfer the land free from all encumbrances, the money would be refunded to the appellants.

In pursuance of this agreement, Messrs Yeoh Kian Teik & Co., purporting to act on behalf of the appellants, wrote a letter dated January 12, 1973 requesting the respondent's solicitors to forward the issue documents of title of the charged land together with the discharge in exchange of the sum of $52,219.71 due under the first account. This request was turned down and as such the appellants sued the respondent claiming a declaration that they are entitled to the discharge of the charges on payment of the amount due on Koh's first account and for other ancillary orders.

The respondent maintained in its defence that the sale agreement dated January 10, 1974 was a fraud and that it had a general lien to retain the charges for the sum due not only on the first account but also on the second account.

Wan Hamzah J. who tried this case in a reserved judgment agreed with the respondent's defence and so dismissed the suit with costs. Hence this appeal.

Just as a mortgage is not irredeemable, likewise a charge is not undischargeable. Under English law a mortgagee or any person interested in the mortgaged property has the right to demand the mortgagee to redeem the mortgage on tendering the amount of debt together with interest thereon due on the mortgage. *Pearce* v. *Morris*[1]. We see no reason to hold that this rule of English law is inapplicable to the present appeal. In our view this rule is applicable although a lot has been said elsewhere about the differences between the common law mortgage and a charge under the Torrens System. (See *S.K. Das* : The Torrens System in Malaya, pp. 429 *et seq.*, and *David Wong*: Tenure and Land Dealings in the Malay States, pp. 172 et seq). In essence both the common law mortgage and the charge under the National Land Code are legal encumbrances on the proprietary right of an owner.

In this appeal the appellants claim a right to the discharge of the charges by virtue of the agree-

ment they entered into with Koh (the chargor) on the January 10, 1973, by which the charged land was sold to them for a total price of $52,000.00. Unless the respondent could show that this agreement is null and void or that the respondent is entitled on other grounds to refuse the demand for the discharge, the appellants should succeed in this appeal.

Question of Fraud:

The agreement is rather short, the material parts of which are as follows:

"NOW THIS AGREEMENT WITNESSETH that in consideration of the sum of Dollar one ($1/–) only paid by the Purchasers to the Vendor and the Purchasers agreeing to purchase the said land it is hereby agreed as follows:

1. The purchase price shall be $52,000/– (Dollars Fifty two thousand only).

2. On the execution hereof the Purchasers shall deposit the purchase price with Messrs Yeoh Kian Teik & Co., who shall utilise such money to settle the debt due to the Oversea Chinese Banking Corporation Limited and obtain a discharge of the said land.

3. The Vendor undertakes to transfer the said land to the Purchasers free from all encumbrances.

4. The Purchasers shall be entitled to lodge a caveat against any transaction over the said land.

5. In the event the Vendor is unable to transfer the said land free from all encumbrances the Purchase Price shall be refunded to the Purchasers free of interest."

6. All stamp and legal fees shall be paid by the Purchasers.

7. This Agreement shall be binding upon the heirs, executors and assigns of the parties hereto."

The learned trial Judge held that there were badges of fraud in this agreement because there was no satisfactory explanation for so low a price of the sale and for the lack of financial benefit to Koh, the chargor.

With respect we cannot agree with this conclusion. We cannot see how an agreement to sell the charged property at the price equivalent to or even less than the amount of debt secured by the charges could be held to be a fraud on the respondent, nor could we see any fraud in the lack of financial benefit to be derived by Koh in the transaction, so long as the respondent as the chargee would receive or be protected to receive the amount secured by the charges. It would have been different if the respondent's right would be adversely affected. The respondent as a chargee has the right to retain the charges and to refuse to discharge them only if there are circumstances showing that it would not receive or would not be paid in full the amount of debt secured by the charges. The fact that a chargor sells his charged property even for a price less than the amount of the secured debt or for a nominal sum of one dollar or makes a free gift to a third party is no concern of the chargee so long as he would be protected to receive in full the debt due to him. Suppose a chargor makes a free gift of the charged land to his son, who subsequently tenders the full amount of debt to the chargee demanding a discharge of the charge, could the free gift be described as a fraud so as to entitle the chargee to refuse to release the charge? The answer must be in the negative. As long as the law recognises the right of a chargor to transfer the charged property (see sections 214 and 215 of the National Land Code), the sale or the gift of the charged property cannot amount to a fraud, even if such sale or gift is effected with a view to preventing the chargee from selling the property, provided, of course, his right remains fully protected.

Likewise the benefit or lack of financial benefit or even adequacy or inadequacy of such benefit to be derived by a chargor from his transaction with a third party should not also be the concern of the chargee as long as his right to collect his debt in full is assured. There could not be any dishonesty in such transaction. In this case it is a perfectly legitimate explanation for Koh (the chargor) to say that he sold the charged land in order to save him from public embarrassment which would ensue if a public sale of his land would be proceeded on. This explanation, if at all relevant, should be accepted as satisfactory. Further, none of the particulars of fraud enunciated in paragraph 8 of the respondent's statement of defence, either taken separately or together, amounts to a fraud. The fact that the appellants agreed to mount a rescue operation to save Koh from public shame by buying the property at a considerably below the market price could not be held against them, if, as we have repeated earlier, the respondent's debt is fully protected.

We also wish to observe here that the loss of 4,200 bags of padi from Koh's godown without any evidence showing that Koh or any of the appellants was responsible for the loss has no bearing at all on the genuineness or otherwise of the sale agreement between Koh and the appellants.

We therefore hold that the sale agreement was not fraudulent but a valid one.

Question of lien:

The amount due on the first account, which was secured by the charges, was $52,219.71cts. and this was also the amount which Messrs Yeoh Kian Teik & Co., solicitors for the appellants, offered to pay the respondent in exchange for the discharge of the charges. The respondent refused to accept the offer of payment, and to release the charges contending that in addition to the charges it also had a general lien on the charged property for the debt due on the second account, which amounted to $198,091.96. The learned trial Judge agreed with the respondent and as such dismissed the appellants' suit.

We agree with the learned Judge's view that bankers and brokers have a general lien on all securities deposited with them for the balance due from their customers and that this rule is excluded where there is an express or implied contract showing intention inconsistent with the existence of a lien. *Brando* v. *Barnett*[2]; *Jones* v. *Peppercorne*[3].

In re London & Globe Finance Corporation[4], a stockbroking firm was held to have a general lien over certain share certificates left with the firm by the customer after a prior specific debt for which the shares were originally deposited was fully paid up. The firm was entitled to hold them until a debt subsequently contracted was settled. Buckley J. at page 420 said:

"..... Here there is nothing at all to exclude the general lien, which it is not, and cannot be, disputed exists. The transactions as between the customer and the broker resulted in a sum owing by the customer to the broker, and there were in the possession of the broker securities which had come into his hands in the course of his business as broker of the customer. It is a well-established principle that the broker has as against the customer the right to hold those securities for the amount due."

On the other hand, in *Wylde* v. *Radford*[5] it was held that where only a property was pledged, the deposit of a title deed which included the pledged and unpledged properties did not confer on the pledgee bank a general lien on both the properties. Kindersley V.C. held that the general lien was excluded from the unpledged property because this property was never intended to be charged at all.

Likewise in *In re Bowes*[6] a life insurance policy for £5,000/– was deposited with bankers to secure payment of all sums due upon general account not exceeding £4,000/– and interest. It was held that the bankers had no general lien for an amount of debt in excess of £4,000/–, because the contract itself displaced the general lien. North J. said that as the express term of the deposit was to secure a sum not exceeding £4,000/–, in the absence of any additional agreement it would be inconsistent to allow the bank to hold the policy for something more.

In *Cuthbert* v. *Robarts, Lubbock & Co.*,[7] it was held that bankers had no general lien over a property belonging to a third person, which was deposited by their customer to secure a specific loan and as such could not hold the property for their customer's debt.

From the review of these cases it is clear that the question as to whether there is or there is no general lien in favour of a banker depends entirely upon the nature of the transaction in respect of which its customer deposited the securities concerned. If the deposit was not intended to be for general purposes, but for a specific one, there can be no question of a general lien arising.

In the present appeal the arrangements between Koh (the chargor) and the respondent with regard to the two accounts operated by the former were very neatly and precisely separated in that the charges of the land were for securing the repayment of overdrawn sum on the first account whilst the pledging of the stock of rice and padi was for securing the repayment of overdrawn sum on the second account. These arrangements were so specific and precise that there is no room left to doubt as to the parties' intention. In our judgment they did not intend a general lien to arise in respect of any of these securities for the overdraft due on the second account. The land was tied up to the overdraft on the first account and was so tied as not to exceed a limit of $50,000.00 and nothing more. Even the respondent itself seemed to act upon this understanding when it asked Koh to execute a further charge of $100,000.00 to cover the reduced value of his stock of rice and padi. Further by instituting a separate civil suit to recover the sum due on the second account the respondent could hardly be said to be acting otherwise than on the understanding that the charges were purely confined to an overdraft on the first account without any extension to the second account at all.

Thus in our judgment the respondent's submission that it had a general lien over the charge

to satisfy the debt in the second account must fail.

Before we conclude this judgment, we wish to advert to paragraphs 5 and 6 of the respondent's statement of defence in which it averred that on January 17, 1973 it filed a suit in Ipoh High Court (Civil Suit No. 10 of 1973) for the recovery of the sum due in the second account and that it had obtained an order of attachment before judgment in respect of the charged land. Evidence to support this defence was led by DW1 who said:

"Action was commenced to recover the amount due on the second account. The Bank obtained prohibitory order on the two titles under the charges."

At the conclusion of the trial on November 11, 1974 the learned trial Judge reserved judgment pending decision of that suit. But when he finally gave judgment six years later (on March 19, 1980) he made no reference to that Civil Suit nor to the order of attachment. Neither did the counsel for both sides make any submission either before the court below or before us touching these two matters. In the circumstances, we must assume that the Ipoh Civil Suit No. 10/1973 and the order of attachment before judgment given pursuant to the institution of that suit had no bearing upon the present case.

In conclusion, as there was no fraud as respects the sale agreement made on January 10, 1973 by which the appellants bought the charged land from Koh and as the respondent had no general lien to hold the charges for the sum due in the second account, the appellants must succeed in this appeal and are entitled to the prayers asked for in paragraph 6 of their Statement of Claim.

The appeal is therefore allowed with costs and the deposit is to be refunded to the appellants.

Appeal allowed.

Solicitors: *Karpal Singh & Co.; Cheang Lee & Ong.*

YAMAHA MOTOR CO. LTD. v. YAMAHA MALAYSIA SDN. BHD. & ORS.

[F.C. (Wan Suleiman, Abdul Hamid & Mohamed Azmi F.JJ.) October 20; December 13, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 80 of 1981]

Practice & Procedure – Application to amend statement of claim after close of pleadings – Application dismissed – Discretion of trial judge not exercised judicially – Rules of High Court, 1980, Order 20.

In this case the appellants as judgment creditors of the first respondents had sued the four respondents for an order that the debenture issued by the first respondent in favour of the second respondent be declared null and void. After the pleadings were closed the appellants applied for leave to amend the amended statement of claim. The application was dismissed by the learned Judge and the appellants appealed to the Federal Court. The amendments sought would have the effect (a) that the appellants would be suing not only in their capacity as judgment creditors but also as majority share holders of the first respondent company and (b) that fraud or unlawful conspiracy would be pleaded expressly in the creation of the 1977 debenture instead of mere lack of consideration and security for a non-existent debt.

Held: (1) the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result (a) whether the application was *bona fide* (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character;

(2) in this case the appellants did not by their amendment seek to change their capacity to sue as envisaged under Order 20 rules 5(4) Rules of the High Court. All they want is to invoke their own right as shareholders of the first respondent company in addition to their right as judgment creditors of the said company, which had gone into liquidation;

(3) on the facts of the present case, even if the allegation of fraud can be held to constitute a new cause of action, the amendment is allowable under Order 20 rule 5(5) as it arises out of the same facts or substantially the same facts as the original cause of action in which the relief had already been claimed by the appellants in the original pleading. The court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of fraud for the first time on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real questions in controversy between the parties;

(4) the learned judge had not exercised his discretion judicially and the appeal should be allowed and the appellants given leave to amend their amended statement of claim.